Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-258

JAL P. MEHTA,

Petitioner,

v.

BERNARD GUILLEMIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID J. ONTELL
510 Fifth Street, N.W.
Washington, D.C. 20001
Attorney for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Jal P. Mehta, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals, For the Ninth Circuit, entered in this matter on April 3, 1978 in No. 75-3761.

OPINIONS BELOW

On April 3, 1978, the United States Court of Appeals For the Ninth Circuit, filed a memorandum opinion (No. 75-3761) (Appendix A) affirming the order of the Honorable Spenser Williams, United States District Judge, Northern District of California, dated November 4, 1975 (No. C-73-0094 SW). (Appendix B)

JURISDICTION

The order of the United States Court of Appeals For the Ninth Circuit affirming the dismissal was filed on April 3, 1978, Petitioner seeks review in this Court under a grant of jurisdiction contained in Title 18 U.S.C. Section 1254(1). He had applied for, and was granted, an extension of the time in which to file his petition for writ of certiorari; the Honorable Mr. Justice Rehnquist signed an order dated June 22, 1978 (No. A-1075) giving the Petitioner until and including August 15, 1978 in which to file his petition.

QUESTIONS PRESENTED

The questions presented by the decision of the United States Court of Appeals for the Ninth Circuit are:

1. Whether or not a federal court, hearing a case solely because of diversity of citizenship between the parties sits "only as another court of the (s)tate," [1] and if not, in what way does one court differ from the other.

2. Whether or not, in a diversity case, a state court's dismissal of an action as a sanction for failure to answer interrogatories, satisfactorily, should be given res judicata effect in federal courts sitting in the same state.

3. Whether or not, in a diversity case, a dismissal based solely on failure to answer interrogatories in a state court, and later given res judicata effect in a federal court of the same state, deprived Petitioner of his right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution.

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[1] See p. 3a, memorandum opinion in *Mehta v. Guillamin*, No. 75-3761, citing *Angel v. Bullington*, 330 U.S. 183 (1947).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Seventh Amendment to the Constitution of the United States: "In suits at common law, . . . the right of trial by jury shall be preserved."

2. California Code of Civil Procedure §2034(d): "(I)f a party or an officer or managing agent of a party willfully fails to serve . . . answers to interrogatories submitted under Section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against the party, or impose such other penalties of a lesser nature as the court may deem just, . . ."

STATEMENT OF THE CASE

Petitioner, a citizen of the United Kingdom, was authorized by Respondent, a stockholder in a South African mining concern, to contest a corporate takeover that offered a price of 7½ pence per share, or a total of about $600.00 for Respondent's holding. Respondent signed a power of attorney in January, 1966, authorizing Petitioner to act on his behalf. On or about February 4, 1966, Respondent further appointed Petitioner his attorney and agent before the South African Supreme Court, where much of the legal battle was fought. An expressed condition of both agreements was that Respondent, along with other dissident shareholders, would assume liability, jointly and severally, for Petitioner's fees and expenses incurred in pursuing the shareholder's claims. About a year later, Petitioner demanded his fee for services rendered. Respondent refused to pay and executed a docu-

ment purporting to cancel any relationship between him and Petitioner.

The instant suit had its beginning in 1968, in Municipal Court of Marin County, California. That complaint was for money due for services rendered in the amount of $3936.00. After a series of defective answers to interrogatories had been submitted by Petitioner, the case was ultimately dismissed with prejudice on July 24, 1972, under California Code of Civil Procedure §2034(d).[2] During the period before dismissal Petitioner was not represented by an attorney; he attempted to answer three times from London, but was unsuccessful in satisfying the demands of Respondent. On the day of the motion no one appeared for him in court. A trial date had already been set. A letter sent to Petitioner by Respondent's attorney conveyed the impression that dismissal was not what was contemplated for his failure in regard to the interrogatories.[3] Petitioner was unaware of the day of the motion until informed by the clerk just a few days before when he called, transoceanic, to confirm the trial date that had already been set.

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[2] California Code of Civil Procedure, §2034(d), states, in pertinent part:

> "If a party . . . willfully fails to serve answers to interrogatories submitted under section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may . . . dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, . . ."

[3] The letter, dated June 29, 1972, and received by Petitioner in London, England on July 5, 1975, stated in pertinent part:

> "Our motion will be heard on July 7, 1972. If granted, the August 9, 1972 trial will be postponed and a new date set only after interrogatories have been answered. You will receive notice of the court's decision on the motion."

Petitioner, coincidentally, in an effort to comply with Respondent's discovery demands sent a third set of answers that happened to arrive at the court just one day before the hearing on the dismissal motion.

Petitioner then retained counsel to move vacation of the order of dismissal but this was denied, too, on October 6, 1972.

Petitioner then appealed to the Superior Court of the State of California, Appellate Department, County of Marin. This appeal was dismissed with prejudice on June 22, 1973 when the Petitioner did not post $250 in security for costs. Petitioner abandoned that appeal, choosing instead to initiate a new suit in the United States District Court, Northern District of California. This suit (73-0094 SW) was filed on January 17, 1973, while the other appeal was pending. The suit alleged additional and different causes of action.[4] Service was promptly effected on the Respondent.

This suit continued with Respondent answering and instituting a counter-suit for fraud and malicious prosecution. Finally, on November 4, 1975, the United States District Court dismissed the suit under the doctrine of res judicata, pursuant to Respondent's motion.

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[4] The original complaint prayed for the sum of $3,936.00 on a breach of contract for debts incurred in the period between January 20, 1966 and May 31, 1968. Petitioner's second complaint concerned transactions occurring from January 20, 1966 to June, 1969, and therefore included claims which were not in existence at the time of the dismissal of the first suit. Further, the complaint filed in the district court alleged several different causes of action including recovery for expenses and services rendered, loss of business opportunities due to Respondent's failure to discharge his debts, loss of use of fees earned, fraud and intentional infliction of emotional distress, none of which were in the original complaint.

Petitioner then appealed to the United States Court of Appeals For the Ninth Circuit (No. 75-3761). They upheld the district court's order by a memorandum opinion filed April 3, 1978. See Appendix A.

REASONS FOR GRANTING THE WRIT

I.

GRANTING THE WRIT OF CERTIORARI WILL PRESERVE THE FEDERAL COURTS FROM THE USE OF STATE PROCEDURE, AND MAINTAIN THE SEPARATION OF STATE AND FEDERAL PROCEDURE.

In *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the Court asserted the dominance of the then newly enacted Federal Rules of Civil Procedure. In upholding Rules 35 and 37, superseding any state decision to the contrary, the court said, "The test must be whether a rule really regulates procedure, – the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 312 U.S. 1, 14.

The import of that case is clear. The federal rules govern the procedure of the federal courts. If the hocus-pocus of "res judicata" is allowed to work its mischief we will again enter a pre-*Sibbach* age where state procedure reigns. In *Sibbach* it did not matter that Illinois state decisions forbad compulsion of physical examinations while Indiana state law was to the contrary. The Federal Rules of Civil Procedure settled the matter. It is much the same here. California can regulate discovery however it pleases, in its own courts, but to make the decision of a California state court determinative in the area of discovery is a blow to the Federal Rules.

That the "out-come" was the same for the Petitioner in Sibbach as would have occurred in a state court did

not prevent this court from applying the Federal Rules to resolve the problem; nor did the presence of state law, in both Illinois and Indiana, cause the court to take notice of it.

If the state were to make a law of state procedure totally at variance with federal practice and Petitioner were to refuse to obey a federal court and, so, have his case thrown out, giving res judicata effect to such, would be exulting state procedure over its own – an outcome clearly against the *Erie* decision.

This court should grant the writ of certiorari to preserve the separation of state and federal procedure.

II.

THE DECISIONS OF THE LOWER COURTS POSE A "THREAT TO THE GOAL OF UNIFORMITY OF FEDERAL PROCEDURE."[5]

If the district court's decision is allowed to stand the goal of uniformity of federal procedure will be dealt a severe blow. It will mean that sanctions given by a state court in furtherance of their own procedural aims will govern the ability of federal courts to hear and decide for themselves.

The situation created by the state court's "adjudication on the merits" is that what would be a perfectly allowable suit in federal court is barred because the Plaintiff did not adhere to the state court's standard of discovery, and their rule for implementing sanctions.

The United States Court of Appeals For the Ninth Circuit, in their opinion, recognized the haphazard nature

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[5] *Hanna v. Plumer*, 380 U.S. 460, 463.

of the ruling in Petitioner's case when they wrote, ". . . While the prior dismissal "with prejudice" might not bar this suit in another state, it did bar the suit in all California courts . . ."[6] Implicit in this admission is that other circuits or even other states in the same circuit might choose to entertain the suit. If Petitioner were not a foreign individual, and Respondent were not an individual, but were instead a corporation doing business in many states Petitioner could have his suit. By not giving res judicata effect to sanctions for failure to obey procedural rules of state courts uniformity will be better achieved.[7]

That this is so is shown by the differences in other circuits when the same problem arises. In *Lohman v. General American Life Insurance Co.*, 478 F.2d 719 (8th Cir. 1973) it was held that the district court's order of dismissal for failure to answer interrogatories was not a judgment on the merits. 478 F.2d 719, 721-723. To the same effect was *Madden v. Perry*, 264 F.2d 169, 175 (7th Cir. 1969). What makes such a dismissal on the merits or not on the merits is the whim of the judge. He can dismiss under Rule 41(b)-F.R.C.P. or choose to provide a reason for his dismissal and so remove the case from the ambit of 41(b). In Petitioner's case the face of the order itself provided the reason – failure to answer interrogatories. In California such a derilection may result in an adjudication on the merits, but in federal courts this need not be so.

In the end we are confronted with a similar problem the court faced in *Hanna v. Plumer*, 380 U.S. 460 (1965).

[6] P. 3a of the memorandum opinion; see Appendix A.

[7] The effect on forum shopping, the other end sought by *Erie* R. Co. v. Tompkins, 304 U.S. 64 (1938), will be minimal; Cf. Hanna v. Plumer, 380 U.S. 460, 469 n.11.

There the court was faced with Rule 4(d)(1) versus the state rule; one allowed the suit to proceed and the other did not. In Petitioner's case Rule 37(b) - F.R.C.P. is juxtaposed with California Code of Civil Procedure §2034(d). The difference is in out-come determination. In *Hanna v. Plumer*, a mechanistic outcome was pre-ordained by the time sequence. In Petitioner's case the outcome determination depends on the will of the judge; he could choose less severe sanctions; but that is for him, and him alone, to decide under Rule 37(b) - F.R.C.P. So, in at least that one sense, this choice of court is not, here, outcome-determinative in the mechanistic context in which *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), occurs.

"Thus there no longer is an *Erie* problem on matters covered by the Civil Rules. If the rule is valid, and if it applies to the case, it is controlling, and no regard need be said to contrary state provisions."[8] The cases of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), and *Ragan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530 (1949), applied state laws, but these laws were hybrid in nature. Petitioner's case concerns only rules of "housekeeping" in the courts. The California rule, which is substantially the same as Rule 37-F.R.C.P., is not inextricably bound up with creation or limitation of the cause of action as were the rules in the three cases.

Uniformity of decision will be better served by allowing the federal courts to provide their own enforcement of their own procedure.

[8] Wright, *Federal Courts* (2 ed. 1970), p. 245.

III.

THIS CASE WILL FURTHER DELINEATE THE PRECISE WAYS, IF ANY, IN WHICH FEDERAL COURTS DIFFER FROM STATE COURTS WHEN THEY SIT IN DIVERSITY CASES.

It is a commonplace that when a federal court sits solely by reason of diversity of citizenship of the parties the federal court so sitting sits as a state court.[9] If the Writ is granted this case can be a vehicle for demonstrating precisely when that is true and when it is not. It is obvious that the above stated rule is an over simplification of the situation with respect to the relation of federal courts to the states they sit in.

The decisions in the cases stemming from *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938) right through to *Hanna v. Plumer, supra,* have worked at dividing "procedure" from "substance." What they have not done, however, is demonstrated when a rule of federal procedure completely pre-empts a state rule. In Petitioner's case the Ninth Circuit has decided that California Civil Code §2034(d), a procedural rule, has determined the merits of the case. The same situation when faced by other federal courts has not always had the same result. Since this is so there is uncertainty as to what rules govern in federal court, and so how federal courts differ from state courts in diversity cases.

In *Hanna v. Plumer,* supra, Rule 4(d), purely procedural, was held to govern service when opposed to a state rule dictating another result. The mechanistic character of that rule made its characterization as procedural a simple task; the court had no disputed facts before it, and needed only to apply the measure of the rule to determine the case. In our case the court had to find facts and impose penalties calling for judgment. If federal courts are clones of state courts in diversity cases then *Hanna v. Plumer* was wrongly decided. But it is obvious from that case as well as others that they are not exactly the same despite the frequent slogan to that effect.

[9] See *Angel v. Bullington,* 330 U.S. 183 (1947).

In upholding the order of the district court, the United States Court of Appeals For the Ninth Circuit relied completely on the case *Kahn v. Kahn,* 68 Cal. App. 3d 372, 137 Cal. Rptr. 332 (1977), where it was held that California Code of Civil Procedure, §2034, allowing dismissal, for failure to make discovery, was an adjudication on the merits, and, so, res judicata. From this they reasoned that *Angel v. Bullington,* 330 U.S. 183 (1947), made the federal district court "another court of the state of California." It has done so for some purposes but not for others.

In *Angel* the issue was the availability of state courts in North Carolina for suits on certain causes of action. The policy of uniformity demanded that in a diversity case the federal court could give no more right to recover to the plaintiff than the same cause of action could in a state court. 330 U.S. 183, 191-192. There was an adjudication on the merits because the state court said no recovery could be had on this particular cause of action. In Petitioner's case we have only the elective sanction of one court. What was decided in that court was that Petitioner was out of that court because of refusal to answer interrogatories. This is merely "housekeeping" in the state court. Other sanctions could have been imposed but were not. It is only the findings of fact – willful failure to make discovery – not the elective sanction which is res judicata. ". . . (T)he desire for uniformity should not cause us to disregard the rule

that state law, statutory or judicial, directed at remedies or powers of courts, cannot affect the federal system." 330 U.S. 183, 198. (Mr. Justice Reed dissenting) "(I)n diversity litigation the federal courts are not simply courts of the state. They are so far as the enforcement of the substantive laws of the state are concerned, but not when procedure or power to act is involved." 330 U.S. 183, 200. See, too, *Lupton's Sons v. Automobile Club of America,* 225 U.S. 489 (1912).

Put succinctly, this court can decide, by this case, whether the penalties imposed by a state court are conclusive on the federal courts. The finding of fact can be done by one court as well as another, and those facts are what, when decided once, need never be decided again. It is the penalty portion, however, which is not a "fact" found by the state court, but only an effect imposed by it in the process of administering its own affairs. Perhaps the federal court could have adopted the facts as found by the state court with reference to the discovery matter but chosen its own sanction, preserving power over its procedure. Facts are facts but penalties and sanctions are not adjudicative of the merits of a suit. This case, if accepted by the court, will help decide when and if federal judges "play the role of ventriloquist's dummy to the courts of some particular state." [10]

[10] James, Civil Procedure, (1965), p. 41 quoting Frank, J. in *Richardson v. Collector of Internal Revenue,* 126 F.2d 562, 567 (2nd Cir. 1942).

CONCLUSION

For the reasons stated herein, Petitioner prays that this petition be granted, and a Writ of Certiorari issue to review the decision of the United States Court of Appeals For The Ninth Circuit.

Respectfully submitted,

DAVID J. ONTELL
510 Fifth Street, N.W.
Washington, D.C. 20001

Attorney for Petitioner.

CERTIFICATE OF SERVICE

This is to certify that I have mailed three (3) copies of the Petition for Writ of Certiorari, postage prepaid, to the Respondent's attorney, Richard F. Barry, 1330 Lincoln Avenue, P.O. Box 1257, San Rafael, California 94902, this 15th day of August, 1978.

DAVID J. ONTELL

APPENDIX

APPENDIX A

[Filed April 3, 1978]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-3761

JAL P. MEHTA,
Plaintiff-Appellant,

v.

BERNARD GUILLEMIN,
Defendant-Appellee.

Appeal from a Judgment of the District Court
for the Northern District of California

MEMORANDUM

Before GOODWIN, WALLACE and HUG, Circuit Judges.

Jal P. Mehta appeals from a judgment dismissing his complaint with prejudice and awarding costs to appellee Bernard Guillemin. We affirm.

This appeal is the final maneuver in a sometimes vigorous effort by Mehta to recover for efforts he supposedly rendered on Guillemin's behalf.

In 1966 Guillemin, a stockholder in a South African mining concern, received in the mail a form for his signature. The form was an authorization for Mehta to con-

test a corporate takeover that offered a price of 7½ pence per share, or a total of about $600.00 for Guillemin's entire holding. It asked for a "voluntary contribution" of five pounds per thousand shares. Guillemin signed and returned it, along with a check for $100.00, which sum corresponded roughly to the five-pounds-per-thousand-shares formula.

Another form arrived some weeks later. It appointed Mehta as Guillemin's attorney and agent before the South African Supreme Court. This also he signed and returned.

In the next correspondence about a year later, Mehta demanded 40% of Guillemin's shares as a "commission". Guillemin refused to pay and soon executed a notarized document cancelling any agency relationship that might have existed between him and Mehta. Mehta's demand spiralled to $1,400.00 cash and then, at the time the instant complaint was filed, to $20,000.00 Allegations of "lost opportunities" and the like brought the total amount demanded to nearly $200,000.00.

The corporate takeover ultimately succeeded and Guillemin received $492.66 for his shares.

The instant lawsuit had its beginnings in a California state suit filed by Mehta in 1968. It was ultimately dismissed "with prejudice" under California Code of Civil Procedure §2034(d),[1] because Mehta refused to answer

[1] The section reads, in relevant part:

> [I]f a party or an officer or managing agent of a party willfully fails to serve . . . answers to interrogatories submitted under Section 2030 of this code, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party, or impose such other penalties of a lesser nature as the court may deem just, ...

interrogatories. Mehta appealed, but his appeal was dismissed when he refused to post security. He then moved over to the federal court and filed this action, based on the same contract claim, with additional allegations of fraud and intentional infliction of emotional distress, both arising out of the same facts. Guillemin moved for summary judgment, based on three different theories. The district court dismissed the complaint with prejudice, asserting the ground of *res judicata.*

In this diversity action, the district court sat only as another court of the State of California. *Angel v. Bullington,* 330 U.S. 183 (1947). While the prior dismissal "with prejudice" might not bar this suit in another state, it did bar the suit in all California courts, including a federal court exercising diversity jurisdiction. 1B *Moore's Federal Practice,* ¶0.409[2], pp. 1020-21, (2d ed. 1974).

Had there been any doubt on this question, it was completely resolved by the case of *Kahn v. Kahn,* 68 Cal.App.3d 372, 137 Cal.Rptr. 332 (1977). There, in precisely the same situation, the court held the second suit barred by *res judicata.*

Mehta's reliance on *Goddard v. Security Title Ins. & Guar. Co.,* 14 Cal.2d 47, 92 P.2d 804 (1939), is unavailing. *Goddard* holds only that the words "with prejudice" are not always a conclusive determination that a judgment is "on the merits" for *res judicata* purposes. *Kahn* establishes that when a dismissal stems from §2034, it is "on the merits".

The judgment is affirmed in all respects.

APPENDIX B

[Filed November 4, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-73-0094 SW

JAL P. MEHTA,

Plaintiff and
Counterdefendant,

v.

BERNARD GUILLEMIN,

Defendant and
Counterclaimant.

ORDER OF DISMISSAL

The parties herein appeared before this Court on Defendant's motion for a dismissal of the complaint. Defendant has raised several grounds for a dismissal, most of which we need not consider here. We find, for the reasons given below, that the complaint in this action is barred by the doctrine of *res judicata*.

In 1965, President Brand, Ltd., through its agent, Anglo American Corporation of South Africa, Ltd., attempted to acquire all of the outstanding shares of Free State Saaiplas Gold Mining Co., Ltd., of which plaintiff Mehta owned 1,000 shares. This action arises out of an alleged agreement between these parties to act concertedly against the proposed takeover.

This action was originally filed in Marin County Municipal Court. Because of plaintiff's refusal to comply with a discovery order of the Marin County Municipal judge, that judge dismissed the case with prejudice against plaintiff on July 14, 1972. The dismissal with prejudice was clearly a sanction for impeding the orderly prosecution and defense of the case. Plaintiff filed an appeal to the Appellate Division of the Marin County Superior Court January 20, 1973, and he filed briefs and numerous statements during the pendency of the appeal. Defendant-respondent filed its brief setting forth all of the issues before the Appellate Division. A notice requiring security for costs was filed April 26, 1973, a motion on the issue was noticed and held, and the appeal dismissed for plaintiff's failure to give security for costs.

The action in this federal court case is the same cause of action which was dismissed with prejudice in the state court proceedings. In federal courts, a dismissal by one district court with prejudice would be *res judicata* in a subsequent action raising the same issues between the same parties. *See, e.g., Reynolds v. International Harvester,* 141 F. Supp. 371 (N.D. Ohio 1955).

This action, however, in federal court on the basis of diversity of citizenship, is the identical to a state court action which has been dismissed. A similar situation faced the United States Supreme Court in *Angel v. Bullington,* 330 U.S. 183 (1947). Threre, all of the issues which the plaintiff wanted to raise were properly before the state court. A demurrer was sustained, and plaintiff did not pursue the case to a final adjudication through appeal. Instead, plaintiff filed suit in federal district court in the same state. The Supreme Court characterized a federal district court in a diversity action as an extension of the state court system: "The essense of diver-

sity jurisdiction is that a federal court enforces State law and State policy . . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld." 330 U.S. at 191-192. The doctrine of *res judicata* was then invoked by the Court to prevent the second suit by Bullington in federal court. 330 U.S. at 192-193.

The plaintiff would urge here that the decision in the state court, under California state law, was not a judgment on the merits and that therefore the present suit is not barred by such a judgment. An analogy to a technical or jurisdictional nonsuit is drawn, and *Bollinger v. National Fire Insurance Co.*, 25 Cal.2d 399 (1944), is cited as authority. In *Bollinger*, however, the plaintiff filed a timely action, but defendant's dilatory actions plus error by the trial court resulted in a nonsuit. The Supreme Court, in ruling that the prior suit had not tolled the statute of limitations, found that the plaintiff had diligently pursued his cause of action, and was therefore not to be denied a forfeiture of his rights. 25 Cal.2d at 410. *But see Bricker v. Crane*, 468 F.2d 1228, 1232 (1st Cir. 1972).

It is clear from *Gagnon Co., Inc. v. Nevada Desert Inn, Inc.*, 45 Cal.2d 448 (1955), that the protection afforded to plaintiffs who suffer the prospect of losing their cause of action through no fault of their own is not afforded to all plaintiff's whose cases are dismissed:

> [A] dismissal with prejudice by plaintiff of its action is a bar to a subsequent action on the same cause; otherwise there would be no meaning to the "with prejudice" feature. "A dismissal with prejudice terminates the action and the rights of the parties are affected by it. . . . But a mere statement that a judgment of dismissal is 'with prejudice' is not conclusive. It is the nature of the action and the character of the judgment that determines whether it is res judicata. . . ." 45 Cal.2d at 455.

The dismissal with prejudice by the Marin County court in this case was the court's way of imposing a sanction on plaintiff for his refusal over a long period of time to provide satisfactory answers to interrogatories which the court had ordered answered. The dismissal with prejudice was intended to foreclose future action by the plaintiff against the same defendant on the same issues because plaintiff himself was impeding the defendant's orderly preparation of his defense. As a federal court sitting in the posture of a state court within the same forum, we find that plaintiff is here attempting to have an "encore" after his prior action succumbed due to his own inexcusable conduct, and that we are thus barred by the doctrine of *res judicata* from entertaining this cause of action.[1] Therefore,

IT IS HEREBY ORDERED that the complaint be dismissed and that reasonable costs be awarded to Bernard Guillemin upon his application therefor under Local Rule 124, this dismissal to be with prejudice.

DATED: November 4, 1975

/s/ Spenser Williams

UNITED STATES DISTRICT JUDGE

[1] We do not address the question of whether the statute of limitations has now run to prevent the filing of this federal court suit. The California case of *Stuckman v. Woodhull*, 170 Cal. App. 2d 424 (1959), provides some authority for the proposition that the statute of limitations would *not* be suspended for the period intervening between the filing of the two actions when the dismissal in the prior case was the result of plaintiffs' own neglect. 170 Cal. App. 2d at 427. *Stuckman* provides a discussion of California law as applied to the statute of limitations in situations analogous to the present case. We need express no opinion on the statute of limitations, in view of the conclusion we reach vis a vis *res judicata*.